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In The

Supreme Court of the United States

October Term, 1995

JOSEPH F. LAMANTIA, ALDO J. PISCITELLI, JOE WING, KENNETH C. HOM, DOMINIC SCALFARO, PHILIP F. BERTUCCI, JOSEPH J. CUTRANO, GINO LEVATO, JOSEPH W. COCO, and JOSEPH T. GALLO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL S. ALEXANDER
(Counsel of Record)
ANDREW M. COHEN
ARNOLD & ALEXANDER, LTD.
155 North Michigan Avenue,
Seventh Floor
Chicago, Illinois 60601
312/819-1555
Attorneys for Petitioner Scalfaro

EDWARD M. GENSON
GENSON, STEINBACK, GILLESPIE & MARTIN
53 West Jackson Boulevard,
Suite 1420
Chicago, Illinois 60604
312/726-9015
Attorneys for Petitioner LaMantia

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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JAMES P. HILLIARD
TIMOTHY P. DONOHUE
29 South LaSalle Street
Chicago, Illinois 60603
312/332-7090
Attorney for Petitioner Levato

LAWRENCE E. SOMMERS
GLENN SEIDEN
200 N LaSalle Street
Chicago, Illinois 60604
312/920-1473
Attorneys for Petitioner Cutrano

CHARLES ARON
19 West Jackson Blvd.
Suite 212
Chicago, Illinois 60604
312/986-8012
Attorney for Petitioner Piscitelli

MICHAEL J. FALCONE
35 East Wacker Drive
Suite 1750
Chicago, Illinois 60601
312/236-7177
Attorney for Petitioner Hom

SHELDON BART NAGELBERG
53 West Jackson Blvd.
Suite 1112
Chicago, Illinois 60604
312/427-6060
Attorney for Petitioner Wing

GARY J. RAVITZ
343 South Dearborn Street
Suite 1510
Chicago, Illinois 60604
312/427-6054
Attorney for Petitioner Bertucci

JOSEPH A. PAVONE
2311 West 22nd Street
Suite 315
Oak Brook, Illinois 60521
708/572-2200
Attorney for Petitioner Coco

ROBERT A. NOVELLE
61 West Superior Street
Chicago, Illinois 60610
312/787-1600
Attorney for Petitioner Gallo

QUESTION PRESENTED

Whether this Court can allow the Seventh Circuit Court of Appeals to emasculate the Fifth Amendment protection of the grand jury, contrary to such cases as *Vasquez v. Hillary*, 474 U.S. 254 (1986), by reversing the dismissal of a grand jury indictment where the indicting grand jury was essentially a conduit to organized crime of detailed information including names and locations of future witnesses, ongoing wiretaps and investigations, and where grand jurors were willing to sell their votes, because these criminal activities compromised the structural protections of the grand jury and created a grave doubt of a substantial influence on the decision to indict?

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THIS COURT CANNOT ALLOW THE SEVENTH CIRCUIT COURT OF APPEALS TO EMASCULATE THE FIFTH AMENDMENT PROTECTION OF THE GRAND JURY, CONTRARY TO SUCH CASES AS *VASQUEZ V. HILLARY*, 474 U.S. 254 (1986), BY REVERSING THE DISMISSAL OF A GRAND JURY INDICTMENT WHERE THE INDICTING GRAND JURY WAS ESSENTIALLY A CONDUIT TO ORGANIZED CRIME OF DETAILED INFORMATION INCLUDING NAMES AND LOCATIONS OF FUTURE WITNESSES, ONGOING WIRETAPS AND INVESTIGATIONS, AND WHERE GRAND JURORS WERE WILLING TO SELL THEIR VOTES, BECAUSE THESE CRIMINAL ACTIVITIES COMPROMISED THE STRUCTURAL PROTECTIONS OF THE GRAND JURY AND CREATED A GRAVE DOUBT OF A SUBSTANTIAL INFLUENCE ON THE DECISION TO INDICT..... 13

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PRAYER

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and order of the Seventh Circuit in which the Seventh Circuit reversed the district court's dismissal of the indictment.

OPINIONS BELOW

The Seventh Circuit's opinion reversing the district court's order dismissing the indictment is published at 59 F.3d 705 and attached hereto in Appendix A. The district court's order dismissing the indictment is published at 856 F.Supp. 424 and attached hereto in Appendix B.

JURISDICTION

On April 7, 1995, a panel of the Seventh Circuit reversed the district court's dismissal of the indictment, charging the defendants with racketeering and gambling-related offenses. On October 2, 1995, this Court, through Justice Stevens, granted the petitioners' motion for extension of time in which to file a *certiorari* petition and ordered the *certiorari* petition to be filed on or before November 10, 1995. This petition has been filed by that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> **No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,** except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural History

On or about July 22, 1993, the Special October 1992-I Grand Jury, Northern District of Illinois returned a five-count indictment (the "Indictment") against the ten defendants in this case. R. 1.[1] During the course of trial preparation, it was brought to the attention of counsel for one of the defendants that a grand juror may have been leaking information regarding proceedings before the grand jury. Defendant Wing filed a motion to dismiss the

[1] Citations to "R." are citations to the Record of the Seventh Circuit Court of Appeals.

indictment in the present case alleging grand juror misconduct as the basis for the dismissal, with other defendants filing motions to dismiss the indictment on the same and additional grounds. R. 146, 152, 154, 157, 161. The government responded to Wing's motion and tendered materials to the district court *ex parte* and *in camera*, regarding the FBI investigation of one of the members of the Special October 1992-I Grand Jury, Robert Girardi. R. 153, 155. Based on those materials, which the defendants had not seen prior to arguing in the district court, the government maintained that there was no prejudice to any of the defendants by Girardi's misconduct, and that therefore the motions of the Defendants should be denied. R. 155. Wing replied to the government's response and alleged that as many as three other grand jurors were possibly engaged in misconduct by offering to sell their votes on indictments. R. 159.

The defendants then filed a joint motion to dismiss the indictment on the basis of grand jury impropriety. R. 168. Therein, the defendants claimed that because the integrity of the grand jury had been impugned by the criminal acts of its members, their Fifth Amendment right to be indicted by a grand jury had been compromised. R. 168. The government's response completely ignored the Fifth Amendment issue and characterized the criminal misconduct as a mere "secrecy" violation, requiring a showing of specific prejudice by the defendants. R. 173. Furthermore, the government's response made extensive use of the Girardi investigation materials which were filed with the district court *ex parte in camera* and were therefore unavailable to the defendants.

On June 3, 1994, the district court filed a Memorandum Opinion and Order dismissing the Indictment. *United States v. LaMantia*, 856 F.Supp. 424 (N.D. Ill., 1994). In that opinion, the district court examined the criminal activities of Girardi and the roles of other members of the grand jury, as well as the role of the grand jury in federal prosecutions, and found that the grand juror misconduct created a structural defect in the indictment process. R. 197.

The government appealed the dismissal of the indictment, leading to the Seventh Circuit's reversal in *United States of America v. LaMantia et al.*, 59 F.3d 705 (7th Cir. 1995). During the course of the briefing of that appeal, Defendant Scalfaro filed a motion requesting the documents which the government had previously filed with the district court, *ex parte in camera*. This motion was granted. Oral argument was had before the Seventh Circuit on April 7, 1995, and the Seventh Circuit reversed the district court on July 13, 1995.

Girardi Markets Grand Jury Information to Organized Crime

On October 5, 1992, prior to the indictment in this case, Robert Girardi was sworn as a member of the Special October 1992-I Grand Jury. R. 155. As soon as Girardi learned he was selected to sit on the grand jury, he offered to provide a family friend, Richard Gelsomino, with details of the proceedings. GX13.[2] Girardi asked

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[2] The designation "GX" followed by a number refers to the exhibits submitted to the district court *ex parte in camera* in

Gelsomino to broker secret grand jury information to Chicago Mafia families because Girardi believed Gelsomino was "connected." GX12, 13. Girardi gave Gelsomino information on a variety of different cases so that Gelsomino would reach out to a number of different people to better his chances of getting paid. GX13.

There were approximately 15-20 meetings between Girardi and Gelsomino to discuss grand jury proceedings. GX13. Girardi understood that there would be money coming to him from the Elmwood Park mob crew (of some 40-75 people) in exchange for the information. GX13. Girardi would page Gelsomino after a grand jury session to discuss the information. GX13 p.2. If nothing happened during that session which would possibly lead to a buyer of the information, there would be no meeting set. GX13 p.2. If, on the other hand, there was information which might be of interest to a potential buyer, a meeting was arranged, usually at night. GX13 p.2. Girardi's brother Tony would often attend these meetings as well. GX13 p.2. There were times when Girardi would write notes with information and have his brother Tony pass those notes on to Gelsomino. GX12 p.3.

Gelsomino decided to cooperate with the FBI. On December 18, 1993, Girardi had a recorded meeting with Gelsomino and FBI Agent John W. Bonino. R. 155. At that meeting, Girardi solicited cash from Bonino in exchange

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conjunction with the government's response in opposition to Defendant Wing's motion to dismiss the indictment (R. 155) and the government's response to the defendants' joint motion to dismiss the indictment based on grand jury impropriety.

for additional information regarding the grand jury proceedings. R. 155. Additionally, Girardi informed Bonino that he had been giving out grand jury information for a year. R. 155.

Girardi's Relationship with the Other Grand Jurors

Girardi developed close relationships with various members of the grand jury. Girardi wanted to be the center of attention amongst the grand jurors. GX46. Girardi was considered to be a "kidder" and was liked by the other grand jurors because of his sense of humor. GX34, 49. He also kept a list of the names and phone numbers of his fellow grand jurors. GX34. Girardi was particularly close to two of the male grand jurors, numbers 1 and 2,[3] who sat next to Girardi in the Grand Jury room. GX34. Both Grand Jurors 1 and 2 were, like Girardi, males with Italian-American surnames.[4] GX34, 35. Additionally, Girardi and Grand Juror 1 went to an off-track betting parlor during the lunch break, where

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[3] The grand jurors are referred to by the numbers assigned by the Office of the United States Attorney when the exhibits which had previously been presented to the district court *ex parte in camera* were produced in redacted form pursuant to the February 21, 1995 order of the district court, entered on defendant Scalfaro's motion for access to the materials.

[4] Grand Juror 2 is an Italian-American from Chicago Heights who runs an auto body shop. Grand Juror 2 advised the FBI that he and his wife were acquainted with individuals from Chicago Heights who were under investigation by the Organized Crime Task Force, as well as being acquainted with several car dealers whose names came up during the investigation by the Girardi Grand Jury. GX35.

Girardi was betting heavily and did not want to leave. GX34. Girardi offered to pick up the winnings for Grand Juror 1, and in fact, did pick them up and del' 'er them as promised. GX34. Following the death of Girardi's father in November or December, 1993, Girardi requested a loan from Grand Juror 1. GX34. Around the same time, Girardi also requested a loan from Grand Juror 2. GX35. While Grand Juror 2 denied having given Girardi a loan, GX35, Grand Juror 1 informed the FBI that Grand Juror 2 did, in fact, give Girardi the requested loan. GX34.

Girardi would often go to lunch with several of the grand jurors, including Grand Jurors 3, 6, 9, 10, 11, 13, and 14. GX34,35,36,44,48,49. During those occasions, Grand Juror 2 often bought lunch for Girardi or whoever else would come along. GX34. Additionally, Girardi was apparently always "on the prowl." GX37. Along those lines, Girardi was close to many of the females on the grand jury, including Grand Jurors 6, 9, 10, 11, and 12. GX34,36,37,44. Of these, there is evidence that Girardi dated Grand Jurors 10, 11, and 12. GX34,36,37,44. Also, Girardi often commuted with one of the female grand jurors. GX45 p.1. Girardi even brought pastries for the entire grand jury on the occasion of Grand Juror 11's birthday. GX36.

Involvement of Other Grand Jurors – Selling the Power to Indict

At some point, Girardi informed Gelsomino that both Gelsomino and Richard Lantini, a private investigator with alleged ties to organized crime, and another target of the Girardi Grand Jury, were under investigation by

the grand jury. GX13,14,39 p.2. Gelsomino then began to pass grand jury information from Girardi to Lantini. GX13 p.2. Lantini stated that a woman called him and said that she could sway the grand jury for money. GX13 p.3-4. The woman stated that she could "guarantee" that Lantini would not be indicted if the money was there up front. GX47B p.3. Lantini then asked Gelsomino if this woman could be the same grand juror who was feeding Gelsomino information. GX13 p.4. Gelsomino assured Lantini that the female was not the same grand juror that was Gelsomino's source. GX13 p.4. Additionally, Gelsomino was informed by Joseph DiFronzo, another target of the Girardi grand jury, that there was an additional source of information about the grand jury proceedings. GX51.

Girardi informed Gelsomino that there were three other grand jurors who might be willing to change their votes if the money was right. GX51 p.3. Girardi explained votes if the money was right. GX51 p.3. Girardi explained that he had gone to lunch with three male grand jurors, and all three of them stated that they would change their votes if they were given $10,000 and tickets to Hawaii. GX51. Girardi related to Gelsomino that the other grand jurors were serious, and that there was no kidding around about their willingness to change their votes for money and tickets. GX51.

The Information from the Girardi Grand Jury

Girardi gave Gelsomino very detailed information regarding different cases being presented before the grand jury. GX13,41,51. This information included the

names and locations of confidential informants as well as undercover officers. GX13. One of the interviews between Gelsomino and the FBI lists thirty-one separate notes regarding grand jury testimony transferred by Girardi to Gelsomino. GX13 p.5-15. Gelsomino destroyed some of his notes which pertained to cases other than his own. GX12, p.4. Three of the surviving notes which appear at GX13, numbers 27, 28, and 30, contain information regarding the defendants *in this case*. GX13 p.13-15. These notes detail wire taps, tape recordings, the testimony of witnesses and some future witnesses in the instant case. GX13 p.13-15. There were also listings of numbers of grand jury photos and who the individuals were. GX13. Girardi was seen to be intent on looking at the pictures of people in the grand jury books, as if he was looking for someone he knew. GX37. There were also times when Girardi would inform Gelsomino who was going to be testifying in the upcoming weeks, as well as who the important witnesses were against the subjects of the various investigations. GX13. Girardi also pointed out that one of the witnesses who had come from prison to testify had come back a second time and stated that his original testimony was all a lie. GX47B.

Voting Irregularities and Other Grand Juror Misconduct

In addition to the close personal and financial ties between Girardi and other members of the grand jury, there is evidence of voting irregularities. Both Grand Jurors 1 and 2, who sat next to Girardi, (GX34, GX42 p.2) noted that there were occasions when Girardi would hesitate to vote for no apparent reason. GX34 p.1, GX35 p.4. At those times, Grand Juror 1 would look at Girardi and

make a silent gesture toward him questioning "why?" at which point Girardi would immediately raise his hand to vote. GX34 p.1, GX35. During its entire service, the Girardi Grand Jury only voted not to return a "True Bill" on one occasion, and Girardi had no part in convincing the grand jury to return that vote. GX46. Girardi expressed his opinion that the grand jury proceeding was a "kangaroo court." GX12 p.2, GX14 p.3.

Girardi was an individual who seemed to "go with the flow" during the voting of the grand jury. GX35. The only comments Girardi made were about some of the witnesses. GX37. However, on one occasion, Girardi was seen questioning a witness about the witness's just completed testimony in a drug case. GX44 p.1. When informed by the foreperson about the impropriety of communication with a witness, Girardi argued that other grand jurors had spoken with other witnesses. GX44.

On those occasions when Girardi was not present, he would ask others, upon his return, about the information he missed during his absence. GX48 p.2. At least one other grand juror admitted that this conduct was not strange in that she would do the same thing herself. GX46 p.3. It was also noted by different grand jurors that there were members of the grand jury who would either sleep or read during the course of the testimony and therefore not be paying attention to the proceedings. GX44 p.2, GX47B p.2.

The FBI Investigation

Based on the information in the Record, the FBI investigation of the Girardi Grand Jury shows that only

11 of the members of the Girardi Grand Jury were interviewed. The FBI never interviewed a majority of the Grand Jury, nor did it interview Grand Juror 12 who allegedly dated Girardi.

The Record also indicates that an informant approached the FBI with information regarding Girardi's misconduct. GX38,39. The FBI agent who the informant contacted did not follow up this lead, GX38 p.1, and the informant stated that he did not follow up on the information because he did not think that he was believed by the agent. GX39 p.2. In addition, Gelsomino told the FBI that he had additional information which had not as yet been divulged to the FBI. GX51 p.5. However, there is nothing in the Record which indicates that the government attempted to obtain any more of that information.

Gelsomino provided the FBI with detailed notes of the information Girardi gave him. GX13. These notes reveal testimony of specifically-named witnesses. GX13. Although the government also had the dates of Girardi's grand jury service (GX28), there is nothing in the record which shows any comparison of the dates of Girardi's service to the dates where the specific witnesses appeared, to show whether Girardi provided information based on testimony from dates when he was not there. In addition to this, there is nothing in the Record which would indicate that there was any independent investigation of Grand Jurors 1 and 2, the grand jurors who were the closest to Girardi, other than a simple interview with them. Nor does the record reveal any investigation of Joseph DiFronzo's independent source of grand jury information.

Following the government's investigation, Girardi was indicted on January 20, 1994 on charges of obstruction of justice, bribery, and contempt of court. *United States v. Girardi*, No. 94 CR 7 (N.D. Ill.). He was found guilty of all charges on May 18, 1994 and was sentenced to 97 months imprisonment. *Id.*

The Extent of the Leaks

Although Girardi claimed that he only revealed grand jury information to Gelsomino and his brother Tony, GX5T at 8, the Record reveals that several other individuals were privy to the workings of the Girardi Grand Jury. These people include Joseph DiFronzo, GX52, pp.3-4; DiFronzo's female source, *Id.*; the informant named in GX38 and GX39; the informant's friend (an ex-Chicago Police Officer), GX39 p.1; Rick Lantini, GX39 p.2, GX14; Lantini's attorney, GX14, p.2; Lantini's partner, Bill Bacon, GX14, p.2; Gelsomino's attorney, GX14 p.5; the female who contacted Lantini with the offer to prevent an indictment for money, GX14 p.2; Clifford Lanas, a Chicago private detective, GX41; Lanas may have mentioned the leak to off-duty police officers who worked for him, GX41, pp.1-2; and a Michael Fusco, GX47B, p.3.

REASON FOR GRANTING THE WRIT

THIS COURT CANNOT ALLOW THE SEVENTH CIRCUIT COURT OF APPEALS TO EMASCULATE THE FIFTH AMENDMENT PROTECTION OF THE GRAND JURY, CONTRARY TO SUCH CASES AS *VASQUEZ V. HILLARY*, 474 U.S. 254 (1986), BY REVERSING THE DISMISSAL OF A GRAND JURY INDICTMENT WHERE THE INDICTING GRAND JURY WAS ESSENTIALLY A CONDUIT TO ORGANIZED CRIME OF DETAILED INFORMATION INCLUDING NAMES AND LOCATIONS OF FUTURE WITNESSES, ONGOING WIRETAPS AND INVESTIGATIONS, AND WHERE GRAND JURORS WERE WILLING TO SELL THEIR VOTES, BECAUSE THESE CRIMINAL ACTIVITIES COMPROMISED THE STRUCTURAL PROTECTIONS OF THE GRAND JURY AND CREATED A GRAVE DOUBT OF A SUBSTANTIAL INFLUENCE ON THE DECISION TO INDICT.

The district court correctly cited precedent for the proposition that the "harmless error" doctrine is not appropriate in cases such as this where structural defects in the criminal justice system are implicated. 856 F.Supp. at 427. This Court, in *Vasquez v. Hillary*, 474 U.S. 254 (1986), stated that harmless-error analysis is not appropriate for a fundamental flaw in the grand jury process which calls into question the objectivity of those charged with bringing a defendant to judgment. In fact:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual

> motivations are hidden from review, and we must presume that the process was impaired. . . . Like these fundamental flaws, which never have been thought harmless, discrimination undermines the structural integrity of the criminal tribunal itself and is not amenable to harmless error review. *Vasquez*, 474 U.S. at 264 (1986). (Citations omitted).

In *Vasquez*, the prosecution argued that a defendant indicted by a grand jury that excluded blacks would have been indicted anyway, and so any error was harmless. *Vasquez*, 474 U.S. at 260. This Court rejected that argument and found that, because of the impossibility of evaluating the effect of potential biases, such fundamental error is not amenable to harmless-error analysis. *Id.* at 263.

More recently, this Court clarified the rationale for distinguishing fundamental errors from those which can be deemed harmless. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court explained that harmless-error analysis applies to errors *in the presentation of evidence* to the grand jury, "which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." This Court distinguished cases such as *Vasquez* and *Tumey v. Ohio*, 273 U.S. 510 (1927), where such structural defects prevented the reviewing court from separating out the erroneous factor. In *Tumey*, the judge had the appearance of a financial interest in the conviction, thereby creating a structural defect which prevents the reviewing court from separating out the erroneous factor.

Nevertheless, here the Seventh Circuit ignored the clear applicability of the structural-error doctrine to the facts of this case, and instead relied primarily on *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). However, as the trial court found, *Bank of Nova Scotia* is readily distinguishable from this case. 856 F.Supp. at 427. This is because *Bank of Nova Scotia* involved Rule 6 secrecy violations which caused some improper evidence to be placed before the grand jury, such as swearing in IRS agents as "agents" of the grand jury and having more than one witness appear at the same time. 487 U.S. at 258-261. This Court was simply able to separate out the erroneous evidence and reach the conclusion that it did not have a substantial effect on the decision to indict. *Id.* at 261. In reaching this conclusion, however, this Court expressly distinguished cases such as *Vasquez*, where the structural protections of the grand jury have been compromised. *Bank of Nova Scotia*, 487 U.S. at 256-257. This is because, as the Court explained in *Arizona v. Fulminante*, where the impartiality of the forum is in question, it is impossible to separate out the taint and simply review the remaining evidence in the record.

As the district court correctly held, this is exactly the situation in the case at hand. The court found that here the taint to the grand jury and the Indictment, unlike in *Nova Scotia*, involved no error in the presentation of evidence, but rather actual independent criminal activity and profiteering by at least one grand juror **within the actual scope of grand jury service** for nearly a year, and was therefore not properly reviewed under the rubric of *Bank of Nova Scotia v. United States*, 856 F.Supp. at 427. The district court reasoned that with the erroneous evidence

presented to the grand jury in *Nova Scotia*, a "reviewing court can cull out the prosecutor's improper statements and determine whether the defendant has been prejudiced. A reviewing court cannot, in this case, filter out or erase the taint Girardi's actions have placed on the grand jury's indictments." *LaMantia*, 856 F.Supp. at 427.

The defendants here had a Fifth Amendment right to indictment by a fair and impartial grand jury. These rights were violated by the overwhelming grand juror misconduct in this case, which compromised the structural protections of the grand jury. Under the above precedent of this Court, it is not necessary to show specific prejudice, and, indeed it would be impossible in this case. This is because the government controls all the information, which it conveniently shrouds in a veil of secrecy. How can the defendants "prove" that they would not have been indicted where the grand juror names are secret and the government consciously chose to not even interview the required majority? If this were the standard it would be impossible to challenge any grand jury misconduct, no matter how egregious.

Fortunately for our criminal justice system this is not the law. Here, as in *Vasquez* and *Tumey*, it is not possible to separate out the effect of the criminal misconduct, nor is this necessary here because the impartiality of the forum is in question. Rather than functioning as an impartial and secret deliberative body, the grand jury here was essentially a conduit to organized crime for detailed information regarding the various investigations. Girardi treated the grand jury as his private money-making venture, with an ongoing plan to sell information to anyone who would pay. It is also obvious from the

facts in the record that Girardi was attempting to build a base of influence among his fellow grand jurors, so that he could successfully sell the power to indict. This effort ran the gamut of influence techniques, from friendship, socializing, gifts, sex, financial and gambling ties, to simple greed and monetary gain. And, in fact, it is clear that Girardi believed he had achieved his goal and was ready to graduate from selling information to selling the power to indict. This is a far more serious breach of structural integrity than, for example, the judge in *Tumey* who had the mere appearance of a financial interest in the outcome of a case.

The sheer scope of the misconduct belies the government's one-sided characterization of the problem as a mere secrecy violation, involving limited persons. In making this argument, the government relied heavily on Girardi's assertion that no other grand jurors were involved, and that Girardi only gave information to Gelsomino. The government also asked the Seventh Circuit to take at face value the assertions by the interviewed grand jurors that they were not involved. As the district court noted, the denials are hardly surprising. 856 F.Supp. at 425. Moreover, there are numerous contradictions in the stories of the different grand jurors. For example, it is interesting that Grand Juror 2, who sat next to Girardi, stated that Girardi took notes only rarely, and Grand Juror 1, who also sat next to Girardi reported only "average" note taking by Girardi. GX34 p.1, GX35 p.2. However, Grand Juror 4 was struck by Girardi's note taking. GX37 p.1. Moreover, even if Girardi's assertions are taken at face value, it shows that there must have been other grand jurors involved. For example, Joseph DiFronzo had

detailed information about the grand jury although Gelsomino never gave DiFronzo any of Girardi's information. GX51. DiFronzo spoke about his independent female "source." *Id.* In addition, Lantini was contacted by a female who offered to sell the power to indict, thus corroborating the assertion Girardi made to Gelsomino that he had three other grand jurors who, with Girardi, could hold up an indictment for $10,000 and plane tickets. GX51.

There is also evidence of Girardi hesitating to vote with his fellow grand jurors on a couple of occasions. GX34,42. This was, in all probability, an attempt by Girardi to "test the waters" to gauge his power to influence the other grand jurors. However, most of the time Girardi was a "go with the flow" grand juror, who did not make waves and who did not even participate in convincing the jury in its one "no true bill" vote. GX35. This makes perfect sense. Girardi's only interest was in selling information and working toward building a voting consensus. He was not about to "waste" his influence on a case where he was not being paid. Clearly here, as in *Vasquez*, it is impossible to separate out this pervasive taint which "undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Vasquez*, 474 U.S. at 263-264.

There are many other facts in the record which support the district court's finding that the harm here is fundamental and structural, like, for example, the sheer number of individuals who had access to detailed grand jury information: Joseph DiFronzo, GX52, p.3-4; DiFronzo's female source, *Id.*; the informant named in GX38 and GX39; the informant's friend (an ex-Chicago

Police Officer), GX39 p.1; Rick Lantini, GX39 p.2, GX14; Lantini's attorney, GX14, p.2; Lantini's partner, Bill Bacon, GX14, p.2; Gelsomino's attorney, GX14 p.5; the female who contacted Lantini with the offer to prevent an indictment for money, GX14 p.2; Clifford Lanas, a Chicago private detective, GX41; Lanas may have mentioned the leak to off-duty police officers who worked for him, GX41, pp.1-2; and a Michael Fusco, GX47B, p.3. This is only what can be found in the Record based on the questionable FBI "investigation." Because Girardi was attempting to market his information to anyone, including the entire Elmwood Park crew of 45-70 people, it is highly likely that many more organized crime figures and grand jury targets had access to the information.

This raises another structural defect which the district court did not even consider. With so many organized crime figures having access to detailed witness and investigation information, the possibility for tampering with grand jury witnesses was extremely high. Gelsomino's notes of leaked information are a wealth of details regarding not just ongoing wiretaps but names and locations of many confidential witnesses and informants. GX13. Included are the names of witnesses expected to appear before the grand jury in the future. GX13. It would be a simple matter for various grand jury targets to put "pressure" on some of these witnesses to change their testimony. Such pressure would not always benefit all defendants. For example, in one of Gelsomino's notes on grand jury proceedings in this case, it states that there is a wiretap in place at Geno's Tavern, and that to bet the

horses one would ask for #10 who was allegedly petitioner Scalfaro. GX13 at 14. Also listed are future witnesses in the grand jury. Id. It would not be difficult in a large multi-defendant case for a defendant to manipulate this information and the listed witnesses to shift blame onto another defendant. Moreover, witness tampering becomes more than just a possibility here, because Girardi was in fact caught discussing with a witness his testimony before the grand jury. GX44. Further, there was evidence that there was at least one witness who testified before the grand jury only to return at a later date and recant his prior testimony. GX47B. Clearly, such conduct impugns the grand jury's integrity. *See, United States v. Peters*, 791 F.2d 1270 (7th Cir. 1986) (dismissal of indictment warranted where defendant shows an abuse of the grand jury process which affects a substantial right or impugns the integrity of the grand jury).

Alternatively, even if the Seventh Circuit was correct in finding that harmless-error analysis was appropriate in this case, the defendants are still entitled to dismissal of the indictment because the evidence raises a grave doubt as to whether the decision to indict was free from substantial prejudice. In *Bank of Nova Scotia*, this Court held that a "grave doubt" as to whether the decision to indict was free from substantial influence is sufficient to warrant dismissal of the indictment. *Nova Scotia*, 487 U.S. at 256. Here, under the facts detailed above, there clearly is a grave doubt. How can there be no doubt where there is evidence of several grand jurors willing to sell their votes? How can there be no doubt where the potential for witness tampering is so high? And how can there be no

doubt with an investigation as incomplete as the one here? As the district court stated:

> . . . after reviewing the FBI reports, we are unconvinced that the defendants were not prejudiced by the Special Grand Jury's improper actions. Although we cannot expound in great detail about the FBI reports submitted in support of the government's Response, we believe a brief summary of some of the events shows that the defendants may have suffered prejudice. 856 F.Supp at 429.

The district court further noted that:

> Too often actors in the criminal justice system trample over the rights of the accused in pursuit of a conviction at any cost. Too often we overlook or minimize these violations of Constitutionally guaranteed rights because it is easier than upsetting the course of a criminal prosecution. We will not, for the sake of convenience, sustain these indictments simply on the ground that these defendants will probably be re-indicted; we will not so easily dispense with our responsibilities as guardians of the constitution and administrators of the criminal law. "Justice must maintain the appearance of justice." *Liteky v. U.S.*, ___ U.S. ___, 114 S.Ct. 1147, 1162 (1994) (Kennedy, J., concurring). In this case, the reality as well as the appearance of justice demand a dismissal of the indictments. 856 F.Supp. at 430.

As shown above, the defendants had a constitutional right to be indicted by a grand jury which was free from criminal activities and improper influences and motivations, and a grand jury that was not a conduit of detailed information to the very organized crime figures being

investigated. This Court should uphold the integrity of the grand jury process and grant certiorari in this case.

CONCLUSION

Wherefore, the Defendant-Petitioners respectfully urge this Court to grant this Petition for Certiorari and review the dangerous emasculation of the grand jury by the Seventh Circuit in reversing the dismissal of this indictment.

Respectfully submitted,

DATED: Nov. 10, 1995

DANIEL S. ALEXANDER
(Counsel of Record)
ANDREW M. COHEN
ARNOLD & ALEXANDER, LTD.
155 North Michigan Avenue,
Seventh Floor
Chicago, Illinois 60601
312/819-1555
Attorneys for Petitioner Scalfaro

EDWARD M. GENSON
GENSON, STEINBACK, GILLESPIE
& MARTIN
53 West Jackson Boulevard,
Suite 1420
Chicago, Illinois 60604
312/726-9015
Attorneys for Petitioner
LaMantia

JAMES P. HILLIARD
TIMOTHY P. DONOHUE
29 South LaSalle Street
Chicago, Illinois 60603
312/332-7090
Attorney for Petitioner Levato

LAWRENCE E. SOMMERS
GLENN SEIDEN
200 N LaSalle Street
Chicago, Illinois 60604
312/920-1473
Attorneys for Petitioner Cutrano

CHARLES ARON
19 West Jackson Blvd.
Suite 212
Chicago, Illinois 60604
312/986-8012
Attorney for Petitioner Piscitelli

MICHAEL J. FALCONER
35 East Wacker Drive
Suite 1750
Chicago, Illinois 60601
312/236-7177
Attorney for Petitioner Hom

SHELDON BART NAGELBERG
53 West Jackson Blvd.
Suite 1112
Chicago, Illinois 60604
312/427-6060
Attorney for Petitioner Wing

GARY J. RAVITZ
343 South Dearborn Street
Suite 1510
Chicago, Illinois 60604
312/427-6054
Attorney for Petitioner Bertucci

JOSEPH A. PAVONE
2311 West 22nd Street
Suite 315
Oak Brook, Illinois 60521
708/572-2200
Attorney for Petitioner Coco

ROBERT A. NOVELLE
61 West Superior Street
Chicago, Illinois 60610
312/787-1600
Attorney for Petitioner Gallo

APPENDIX A

UNITED STATES of America, Plaintiff-Appellant,

v.

Joseph F. LAMANTIA, Aldo J. Piscitelli, Joe Wing, Kenneth C. Hom, Dominic Scalfaro, Philip F. Bertucci, Joseph J. Cutrano, Gino Levato, Joseph W. Coco, and Joseph T. Gallo, Defendants-Appellees.

No. 94-2667.

United States Court of Appeals,
Seventh Circuit.

Argued April 7, 1995.

Decided July 13, 1995.

Government appealed from order of the United States District Court for the Northern District of Illinois, Brian Barnett Duff, J., 856 F.Supp. 424, which dismissed indictment because of grand juror's misconduct in selling information concerning deliberations. The Court of Appeals, Cummings, Circuit Judge, held that: (1) in the absence of finding of prejudice, court could not dismiss indictment on grounds that grand juror's misconduct had irreparably corrupted the indictment process, and (2) defendants were not prejudiced by grand juror's misconduct.

Vacated and remanded.

John J. Scully (argued), Crim. Div., Barry Rand Elden, Asst. U.S. Attys., Scott Charles Collins, Chicago, IL, for U.S.

Daniel S. Alexander (argued), Andrew M. Cohen, Arnold & Alexander, Chicago, IL, for Dominic Scalfaro.

Timothy P. Donohue, James P. Hilliard (argued), Chicago, IL, for Gino Levato.

Lawrence Edmund Sommers (argued), Glenn Seiden, Chicago, IL, for Joseph J. Cutrano.

Sheldon Bart Nagelberg, Chicago, IL, for Joe Wing.

Gary J. Ravitz, Chicago, IL, for Philip F. Bertucci.

Michael J. Falconer, Chicago, IL, for Kenneth C. Hom.

Charles Aron, Chicago, IL, for Aldo Piscitelli.

Louis Carbonaro, Carbonaro & Carbonaro, Chicago, IL, for Joseph F. Lamantia.

Joseph A. Pavone, Oak Brook, IL, for Joseph W. Coco.

Robert A. Novelle, Joel A. Whitehouse, Serpico, Novelle & Navigato, Chicago, IL, for Joseph T. Gallo.

Before CUMMINGS, EASTERBROOK and RIPPLE, Circuit Judges.

CUMMINGS, Circuit Judge.

In July 1993, a grand jury indicted these defendants on a number of gambling and racketeering charges. Some time later the defendants learned that a grand juror named Robert Girardi had been caught purveying details of the grand jury's investigation to some of its subjects. In December 1994, while their trial was still pending, defendants challenged their indictment on the basis that Girardi's misconduct violated their due process rights. The district judge agreed: he dismissed the indictment, concluding that Girardi's corrupt actions "infected and tainted the grand jury process itself." *United States v.*

Lamantia, 856 F.Supp. 424, 426 (N.D.Ill.1994). The government appeals the district court's ruling, and we reverse.

BACKGROUND

Robert Girardi began sitting as a member of the Special October 1992-I Grand Jury on January 4, 1993. Viewing his jury service as a potentially lucrative opportunity, Girardi asked a friend named Richard Gelsomino, whom the grand jury was investigating at the time, if Gelsomino knew anyone who might pay for information about the proceedings. Gelsomino met with Girardi on several occasions to glean information about the investigation from him, but did not succeed in interesting anyone else in the offer. He did relay Girardi's offer to another grand jury target named Richard Lantini, but Lantini apparently was concerned that this offer was too good to be true. Lantini consulted his attorney about what he should do, and the attorney contacted the FBI.

FBI agents subsequently investigated the allegations regarding Girardi's misconduct, initially by tape recording conversations between Girardi and Gelsomino (who by that point was cooperating with the government). One FBI agent posed as an individual interested in purchasing information from Girardi, who expressed a willingness and desire to consummate the deal. In these conversations, Girardi told the agent that he was working alone in selling the grand jury information and that apart from his brother, no one else knew of his actions.

In January 1994, agents arrested Girardi after he agreed to a $500-per-week deal with the undercover FBI

agent. Girardi was convicted of contempt of court, bribery, and obstruction of justice and is now serving a 98-month sentence.

In order to determine the extent of the corruption within the Special October 1992-I Grand Jury, FBI agents subsequently interviewed 11 grand jurors who were known to socialize with Girardi. All eleven denied knowing what Girardi had been up to or participating in it in any way. Interviews with Gelsomino and Lantini, however, suggested the possibility of more pervasive grand juror misconduct. Gelsomino told interviewers that he had a female source of information regarding the proceedings, although he did not identify her as a grand juror. Lantini, through his attorney, asserted that a woman had contacted him anonymously and told him he would not be indicted if he "came up with the money." The FBI found no corroborating evidence to support these isolated allegations of more widespread impropriety; Girardi's criminal activities alone were confirmed.

Discovery of Girardi's misconduct created a stampede to the courthouse as people who had been indicted by the grand jury (and in some cases, convicted) challenged their indictments. These challenges were for the most part unsuccessful. See, *e.g.*, *United States v. Coffey*, 854 F.Supp. 520, 522-524 (N.D.Ill.1994) (Plunkett, J.); *United States v. Li*, 856 F.Supp. 411, 415-416 (N.D.Ill.1994) (Hart, J.); *United States v. Mebust*, 857 F.Supp. 609, 617-618 (N.D.Ill.1994) (Williams, J.); *United States v. Messino*, 855 F.Supp. 955, 959-960 (N.D.Ill.1994) (Alesia, J.).

The lone exception occurred in this case: the district judge, castigating what he called "the disrespect some

courts and prosecutors have displayed for the grand jury system . . . and . . . the gradual emasculation of one of our republic's most cherished traditions," dismissed the indictment against these defendants under his supervisory powers, ruling that grand juror misconduct had created a structural defect in the indictment process. Lamantia, 856 F.Supp. at 426.

ANALYSIS

Robert Girardi betrayed his service as a grand juror. That much is undisputed and, given Girardi's subsequent prosecution and incarceration, merits no further consideration. The relevant question for purposes of this case is not whether Girardi undermined his role as a grand juror, but whether he (alone or with others) undermined the role of the grand jury – whether the circumstances "significantly infringed on the ability of the grand jury to exercise independent judgment." *United States v. Edmonson*, 962 F.2d 1535, 1539 (10th Cir.1992); see also *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir.1981). Only if the latter is true did the district court have authority to dismiss the indictment – for as a rule courts are not endowed with supervisory authority over the grand jury, which was conceived and remains functionally independent. See *United States v. Williams*, 504 U.S. 36, 47-48, 112 S.Ct. 1735, 1742, 118 L.Ed.2d 352 (1992) (discussing history of grand jury as "kind of buffer or referee" belonging to no branch of institutional government, and concluding that judicial supervision is "very limited"); see also *United States v. Gillespie*, 974 F.2d 796, 800-801 (7th Cir.1992); *United States v. Schwartz*, 787 F.2d

257, 267 (7th Cir.1986) (both acknowledging courts' limited supervisory powers). Courts are generally not free to delve beneath the four corners of a validly returned indictment; they are generally not free to prescribe rules for the operation of the grand jury beyond those set out by Congress. *Costello v. United States*, 350 U.S. 359, 364, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956) (review of facially valid indictments "would run counter to the whole history of the grand jury institution"); *Williams*, 504 U.S. at 50, 112 S.Ct. at 1744 ("any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.").

These restrictions do not, of course, render the judicial system completely impotent in the face of grand jury improprieties. Where the misconduct amounts to one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions," *United States v. Mechanik*, 475 U.S. 66, 74, 106 S.Ct. 938, 943, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring), then the court's supervisory authority can be used to dismiss an indictment. It is not enough, however, that the rules have been violated or that "the integrity of the judicial process" has been impugned; the defendant must have suffered prejudice as a result. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S.Ct. 2369, 2373, 101 L.Ed.2d 228 (1988) ("as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.").

Girardi's unauthorized disclosures and attempts to secure payments in exchange for information certainly violated clear rules promulgated for the grand jury. Rule 6 of the Federal Rules of Criminal Procedure, which governs grand jury formation and conduct, prohibits grand jurors from disclosing "matters occurring before the grand jury," and prescribes that a "knowing violation of [this Rule] may be punished as a contempt of court." Fed.R.Crim.P. 6(e). Therefore the district court had the supervisory authority, under *Bank of Nova Scotia*, to dismiss defendants' indictment if the court found that they had suffered prejudice.

The district court did not make factual findings of prejudice, although it did analyze the available evidence in some detail. Instead, the court concluded that because of the nature of the improprieties, a showing of prejudice was not a necessary prerequisite to relief for the defendants. Proclaiming that Girardi's misconduct had "irreparably corrupted" the indictment process, the district court held that in this case the structural protections of the grand jury had been compromised beyond repair. 856 F.Supp. at 428.

This conclusion is not devoid of support in the case law. The Supreme Court has on a number of occasions held that deep-rooted irregularities in grand jury composition could affect the deliberative process and create a structurally defective body such that indictments could be dismissed without a showing of prejudice. See, *e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 260-264, 106 S.Ct. 617, 621-624, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jurors compelled dismissal of indictment); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61

L.Ed.2d 739 (1979) (same); *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (exclusion of women from grand jury compels dismissal).

However, as clarified in *Bank of Nova Scotia*, 487 U.S. at 256-257, 108 S.Ct. at 2374-2375, these "structural defect" cases are not isolated exceptions to an overall rule, but rather part of a discrete line of cases with a coherent message.[1] Rather than require defendants to make the all-but-impossible showing of how subtle, inherent biases and stereotypes from a racially or gender discriminatory jury can affect the indictment process to their detriment, the Supreme Court simply created an irrebuttable presumption of prejudice in these cases. *Id.* at 257, 108 S.Ct. at 2375 ("the nature of the violation allow[s] a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation").[2]

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[1] The district judge in the instant case linked the *Vasquez* line of cases with a series of cases invalidating indictments issued by a grand jury whose term had expired. See, *e.g.*, *United States v. Bolton*, 893 F.2d 894 (7th Cir.1990); *United States v. Taylor*, 841 F.2d 1300 (7th Cir.1988), certiorari denied *sub nom. Rosenstein v. United States*, 487 U.S. 1236, 108 S.Ct. 2904, 2905, 101 L.Ed.2d 937 (1988). These cases, which turn on adherence to the rules prescribed by the Federal Rules of Criminal Procedure, do not involve the presumption of prejudice.

[2] The Supreme Court has explicitly limited the reach of cases such as *Vasquez*. In *Mechanik*, the Court noted that *Vasquez* was "compelled by precedent directly applicable to the special problem of racial discrimination" because "one could presume that a discriminatorily selected grand jury would treat defendants of excluded races unfairly." 475 U.S. 66, 71 n. 1, 106 S.Ct. 938, 942 n. 1, 89 L.Ed.2d 50 (1986). Thus, "the remedy of

The situation faced by the defendants in the present case cannot be shoehorned into the *Vasquez* line simply by calling the problem a structural one or alleging that misconduct makes the "grand jury no longer a grand jury." *Lamantia*, 856 F.Supp. at 426, quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802, 109 S.Ct. 1494, 1499-1500, 103 L.Ed.2d 879 (1989). The Special October 1992-I Grand Jury apparently was properly constituted (there is no allegation that it was not). Both women and minorities were called to service. The requisite number of grand jurors were in attendance. In short, there was nothing about its inherent structure that would mandate or even permit a presumption of prejudice. Unlike a discriminatorily selected grand jury, which "it could be presumed [simply by its composition] would treat defendants unfairly," *Bank of Nova Scotia*, 487 U.S. at 257, 108 S.Ct. at 2375, there was no reason to suspect that this body of grand jurors would not perform its tasks satisfactorily.

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automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future."

The Court continued:

> We think that these considerations have little force outside the context of racial discrimination in the composition of the grand jury. No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings, and the societal interest in deterring this sort of error does not rise to the level of the interest in deterring racial discrimination.

Id. While gender discrimination may be viewed as analogous to racial discrimination, corruption among grand jurors may not.

Corruption in this grand jury thus was present not from the start as a direct, albeit amorphous, result of its formation, but only after an individual grand juror made the decision to engage in criminal activity. When he did so, he left a trail: he removed notes from the courtroom; made telephone calls that eventually were recorded; contacted potential buyers, who came to include an FBI agent. In short, he gave the government the evidence they needed to later convict him of a number of charges carrying a stiff prison sentence. It seems slightly incongruous, given that defendants' current challenge to their indictment only came to light as a result of disclosures about Girardi's behavior, to conclude that "[a] reviewing court cannot . . . filter out or erase the taint" to determine whether defendants were prejudiced. *Lamantia*, 856 F.Supp. at 427. Far from being a case where prejudice must be presumed, here the evidence of prejudice – or lack thereof – is available for evaluation.

The district judge, as we have stated, did explore the evidence relating to Girardi's misconduct and the subsequent FBI investigation in some detail. Although he suggested (without making explicit findings of fact) that the possibility of prejudice to the defendants loomed large, this conclusion is not credible. Eliminating speculation and unsupported inferences and concentrating specifically on what the investigation unearthed, we conclude that defendants in this case were not prejudiced by Girardi's – or anyone else's – misbehavior.

We begin with Girardi. The activities for which he was prosecuted and convicted could not have prejudiced these defendants, or any of the other individuals who were indicted by the grand jury. What he did (according

to him, on a solo basis) was to report back to Gelsomino regarding the grand jury: who appeared, the substance of their testimony, the grand jurors' reactions. Gelsomino took notes on what Girardi told him, and some of defendants' names appeared at least once in these notes. The problem (from defendants' perspective) is that premature access to information about the case building against them, whether in their hands or in someone else's, could only redound to their benefit. Secrecy violations by other grand jurors – none were proven, although the district court thought that some grand jurors might have spilled confidential information in social settings or in drunken stupors – could have had no more damaging effect.

The district judge also was concerned that non-verbal communication among jurors prior to voting on indictments indicated a prejudicial "pack mentality." It would be unrealistic, however, to deny that closeting together a group of individuals for up to 18 months would likely create alliances and blocs. These are a natural part of group behavioral dynamics, like it or not; as a matter of law a conclusion of prejudice based on one juror's raising his eyebrows at another, which is the sum total of "pack"-like conduct alleged by any juror, simply cannot stand.

Defendants raise another more serious argument regarding possible prejudice: that certain of the grand jurors may have solicited bribes in exchange for a refusal to indict. There is evidence uncovered by the FBI, in the form of unsworn testimony from Gelsomino, that Girardi told him about two or three other grand jurors who would sell their votes for cash and tickets to Hawaii. Lantini, through his lawyer, also reported receiving a

phone call from an unidentified woman who told him he would not be indicted if he "came up with the money."

The availability of jurors willing to sell their votes, like the possibility of obtaining early disclosures, appears to offer a benefit to interested (and unscrupulous) defendants and to have no effect on anyone else. Defendants, however, complain that in order to maintain a sufficiently high rate of indictments to placate prosecutors and keep suspicions at bay, grand jurors may have evened the scales to the detriment of those not participating in the bribe scheme. The district court also thought that the bribers may actually have retaliated against non-bribees by indicting them.

These are troubling speculations but they are simply speculations, and they require too many leaps of faith to be credible given the existing evidence. Although Gelsomino told investigators that Girardi said he had two or three other grand jurors ready to sell their votes for cash and trips to Hawaii, there is no other corroboration of Gelsomino's statement. There are, instead, a host of vehement denials from all of the grand jurors who were close to Girardi; Girardi himself told the undercover agent that he was working alone.

Even assuming the existence of a bloc of jurors for sale, there is no evidence that any of them ever solicited a bribe. Lantini did not report any follow-up calls from the anonymous woman, and Girardi never provided additional information about his fellow Hawaii hopefuls. If defendants in this case have more hard evidence – if, for example, they were approached for bribes – they certainly have not apprised us of this fact.

A sound basis to suspect the actual existence of bribe-seekers thus is the first missing link; the second is a reason to suspect retaliation or juggling of indictment statistics by these purported bribees even assuming they exist. Without a reasonable factual foundation for suspicion, there is inadequate evidence to support a finding of potential prejudice to these defendants for the reasons they have stated. And without such a showing, as by now should be clear, the fact that Girardi's criminality cast a pall over the Special October 1992-I Grand Jury does not invalidate its work.

CONCLUSION

Although this Court shares in the district court's distress over the behavior of Robert Girardi and the corresponding shame and disrepute his actions brought upon the grand jury system, we cannot agree with the district judge's resolution of the instant case. The district court's ruling dismissing the indictment of defendants LaMantia *et al.* thus is vacated, and this case is remanded for proceedings not inconsistent with this opinion. On remand, pursuant to Circuit Rule 36, a different district judge shall hear the case.

APPENDIX B

UNITED STATES of America,

v.

Joseph Frank LAMANTIA, et al.

No. 93-CR-523.

United States District Court,
N.D. Illinois,
Eastern Division.

June 3, 1994.

Defendants moved to dismiss indictment based on grand jury impropriety. The District Court, Brian Barnett Duff, J., held that indictments could not stand in light of grand juror's conviction of contempt of court, bribery, and obstruction of justice for selling information obtained to grand jury proceedings.

Motions granted.

James Philip Hilliard; and Timothy Patrick Donohue, Chicago, IL, for Gino Levato.

Lawrence F. Sommers; and Glenn Seiden, Chicago, IL, for Joseph Cutrano.

Sheldon Bart Nagelberg, Chicago, IL, for Joe Wing.

Gary Jay Ravitz, Chicago, IL, for Philip F. Bertucci.

Daniel S. Alexander, Arnold & Alexander, Ltd., Chicago, IL, for Dominic Scalfaro.

Michael James Falconer, Chicago, IL, for Kenneth C. Hom.

Joseph A. Pavone, Oakbrook, IL, for Joseph W. Coco.

Robert A. Novelle, Serpico, Novelle, Dvorak & Navigato, Ltd., Chicago, IL, for Joseph Tony Gallo.

Martin S. Agran, Chicago, IL, for Aldo John Piscitelli.

Louis Carbonaro, Carbonaro & Carbonaro, Chicago, IL, for Joseph Frank Lamantia.

John Joseph Scully, U.S. Attorney's Office, Chicago, IL, for the U.S.

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

The issues raised in defendants' Joint Motion to Dismiss the Indictment Based on Grand Jury Impropriety present a question of first impression, to wit, can an indictment stand when a grand juror has been convicted of felonies committed as a member of the indicting grand jury? We find that juror Girardi's illegal actions have nullified the indictment, and therefore grant the defendants' Motion to Dismiss.

Undisputed Facts.

On May 18, 1994, Robert M. Girardi was convicted of contempt of court, bribery and obstruction of justice for selling information pertaining to the Special October 1992 – I Grand Jury. Girardi first discussed the grand jury proceedings with his childhood friend Richard Gelsomino, who was under investigation by the grand jury. Gelsomino has stated that, as soon as Girardi learned he

was selected to sit on the grand jury, he agreed to provide Gelsomino with details of the proceedings. Girardi also asked Gelsomino to find someone who would be willing to pay for the secret grand jury information.

Gelsomino passed Girardi's information on to Richard Lantini, who was also under investigation by the grand jury. Apparently believing he was being set up, Lantini told his attorney of Gelsomino's disclosures. Lantini's attorney subsequently informed the FBI.

After being questioned by the FBI, Gelsomino implicated Girardi as the source for his inside information. Girardi apparently expressed considerable disrespect for the process, calling the grand jury proceedings a "kangaroo court" where anyone could be indicted. Gelsomino also claimed that Girardi had told him that there were three other jurors who would sell their votes for trips to Hawaii and $10,000 cash.

As part of its investigation of Girardi, the FBI interviewed the grand jurors with whom Girardi appeared to be most closely associated. Not surprisingly, all 11 jurors interviewed denied any knowledge of Girardi's actions. The government also learned that another party investigated by the grand jury allegedly informed Gelsomino that he had a female source within the Department of Justice who kept him informed of the grand jury's progress. Finally, Lantini stated that he received a phone call from a woman who told him he would not be indicted if "he came up with the money."

Girardi admitted telling Gelsomino that three other jurors would sell their votes, but denied actually discussing his activities with any other members of the grand jury. He further denied that there were any other jurors

willing not to indict certain defendants in exchange for tickets to Hawaii and cash. Girardi was not charged with attempting to hold up an indictment for money. Gelsomino, Lantini and the defendants herein were all indicted by the Special Grand Jury.

The Role of the Grand Jury in Federal Prosecutions.

An indictment by a federal grand jury is neither a mere formality nor an empty exercise to be performed by the government before a person can be held to answer for a criminal offense. The right to an indictment by a legally constituted, impartial grand jury is explicitly guaranteed by the Fifth Amendment to the Constitution. This right must mean more than an indictment by a body consisting of at least one member who viewed the proceedings as a "kangaroo court" and was willing to trade his solemn obligations for cash. We do not share the disrespect some courts and prosecutors have displayed for the grand jury system (observed by the Supreme Court over 20 years ago[1]) and refuse to acquiesce in the gradual emasculation of one of our republic's most cherished traditions.

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[1] "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive . . . [i]t is not uncommon for witnesses summoned to appear before the grand jury at a designated room to discover that the room is the room of the prosecutor." *U.S. v. Mara*, 410 U.S. 19, 23-24, 93 S.Ct. 774, 777, 35 L.Ed.2d 99 (1973) (Douglas, J. dissenting); "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . " *U.S. v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1972).

A legally constituted and unbiased grand jury "[i]s the only accusatorial body of the Federal Government recognized by the Constitution." *U.S. v. Mara*, 410 U.S. 19, 28, 93 S.Ct. 774, 779, 35 L.Ed.2d 99 (1973) (Douglas, J., dissenting). Grand juries are "the essence of the rule of the people," *U.S. v. Smyth*, 104 F.Supp. 283, 286 (N.D.Cal.1952), and serve "the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." *U.S. v. Mechanik*, 475 U.S. 66, 74, 106 S.Ct. 938, 943, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring) (citations omitted). By offering to sell grand jury information and, perhaps, the power to indict, Girardi effectively perverted and actually abnegated the Special October 1992 – I Grand Jury's authority as a legally constituted accusatorial body. As such, its indictment of the defendants is irreparably corrupted, and cannot stand.

Girardi's Actions Amounted to More than a Secrecy Violation.

In their briefs, defendants gave a thorough review and analysis of the history of the grand jury and its preeminence as a buffer between the government and the citizenry. In so doing, the defendants addressed some of the due process concerns that this Court initially felt in hearing of Girardi's offensive conduct and that we expressed to the parties in open court. The government elected to down play these due process concerns, and attempted to paint Girardi's actions as a mere breach of his duty to keep the grand jury proceedings confidential.

Its argument was belied by the fact that its subsequent indictment of Girardi shows that his actions resulted in violations to the criminal justice system which were much more significant than a breach of the secrecy provisions of Rule 6(e).

For example, one statute under which Girardi was convicted required the jury to find that Girardi's actions were "corrupt." 18 U.S.C. § 1503. The jury convicting Girardi was also obligated to find that Girardi "corruptly" demanded "money in return for being induced to do acts in violation of his official duty." 18 U.S.C. § 201(b)(2)(C). It is both reasonable and appropriate for us to conclude that Girardi's "corrupt" actions infected and tainted the grand jury process itself and that the harm resulting from Girardi's actions is both different from and greater than the harm which results from a simple violation of Rule 6(e). Here, the defect is "so fundamental that it causes the grand jury no longer to be a grand jury, [and] the indictment no longer to be an indictment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802, 109 S.Ct. 1494, 1500, 103 L.Ed.2d 879 (1989).

The Harmless Error Doctrine is Inappropriate.

The presence and participation of a grand juror who exhibited and exercised utter disregard for the equitable administration of justice caused a *structural defect* in the grand jury process, and, therefore, a substantial constitutional deprivation to the defendants. Girardi's misdeeds were not simply an error in the *trial process*. A recent Supreme Court case informs us of the distinction between

fundamental error and trial errors, and helps us distinguish simple violations of Rule 6 from the obstruction of justice which occurred in this case.

In *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991), *reh. den.* 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991), the Supreme Court articulated a test for determining whether a violation of a criminal defendant's constitutional rights is so fundamental to our democratic system that prejudice is presumed, or whether the violation merely requires analysis under the "harmless error" doctrine. The *Fulminante* Court was considering whether the admission into evidence of an involuntary confession required an automatic reversal of a conviction, or whether the defendant was required to show prejudice.

In its analysis, the Supreme Court noted that the harmless error doctrine was not appropriate where structural defects in the administration of criminal justice were implicated. These errors of "constitutional magnitude" include the unlawful exclusion of members of a defendant's race from the grand jury, the right to self-representation at trial and the right to a public trial. *Fulminante*, 499 U.S. at 310, 111 S.Ct. at 1265, *citing*, *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178 n. 8, 104 S.Ct. 944, 950-51 n. 8, 79 L.Ed.2d 122 (1984), *reh. den.* 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148 (1984); *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, 104 S.Ct. 2210, 2217, n. 9, 81 L.Ed.2d 31 (1984). The *Fulminante* Court found that the harmless error doctrine *is* appropriate in situations where the constitutional violation resulted in the introduction of

inappropriate evidence into an otherwise fair trial. 499 U.S. at 310, 111 S.Ct. at 1265.[2]

The *Fulminante* rubric readily distinguishes the instant case from *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). In *Bank of Nova Scotia*, a district court dismissed an indictment on the grounds that the federal prosecutor had violated Rules 6(e) and 6(d) and otherwise acted improperly in putting his case before the grand jury. The Supreme Court found that Federal Rule of Criminal Procedure 52(a) applied to the prosecutorial misconduct at issue, and that the district court did not have the authority to dismiss an indictment, without a showing of prejudice to the defendants. 487 U.S. at 255, 108 S.Ct. at 2373.

The errors treated in *Bank of Nova Scotia* did not arise from the grand jury itself, but concerned matters placed before the grand jury. There is a fundamental difference between the prosecutorial misconduct at issue in *Bank of Nova Scotia* and the misbegotten indictment at issue here. Like the cases cited by the Supreme Court in support of its holding in *Fulminante*, prosecutorial misconduct concerns matters presented to the grand jury, *ie.* matters of evidence. A reviewing court can cull out the prosecutor's

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[2] Supreme Court precedent not cited in *Fulminante* which applied the harmless error doctrine to constitutional violations are in accord with our analysis. For example, in *Coleman v. Alabama* 399 U.S. 1 [90 S.Ct. 1999, 26 L.Ed.2d 387] (1970), the Court applied the harmless error test to the wrongful denial of counsel at a preliminary hearing. The Court's inquiry into whether the defendant was prejudiced was premised on its concern that certain prejudicial *evidence* may be uncovered at a preliminary hearing.

improper statements and determine whether the defendant has been prejudiced. A reviewing court cannot, in this case, filter out or erase the taint Girardi's actions have placed on the grand jury's indictments.

This difference is apparent in decisions where courts considered structural defects in the grand jury process, and decided that the only remedy for these defects was a dismissal of the indictment. These structural defects occur, for example, when either racial or gender bias were exercised in selecting members of the grand jury and where the grand jury term was improperly extended. *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Ballard v. U.S.*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946); *U.S. v. Bolton*, 893 F.2d 894 (7th Cir.1990); *U.S. v. Taylor*, 841 F.2d 1300 (7th Cir.1988), *cert. den. sub nom Rosenstein v. U.S.*, 487 U.S. 1236, 108 S.Ct. 2904, 101 L.Ed.2d 937 (1988); *U.S. v. Armored Transport, Inc.*, 629 F.2d 1313 (9th Cir.1980), *cert. den.* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981); *U.S. v. Macklin*, 523 F.2d 193 (2nd Cir.1975); *U.S. v. Fein*, 504 F.2d 1170 (2nd Cir.1974).

The Supreme Court in *Vasquez* held that indictments rendered from an improperly impaneled grand jury must be dismissed. These invalid indictments cannot be cured by a subsequent error-free trial because the grand jury shapes the indictment and therefore substantially influences the way in which the case is put before a petit jury. 474 U.S. at 263, 106 S.Ct. at 623. The *Rose* court found that "alternate remedies" to dismissing an indictment (in that case – civil suits charging discrimination; here – contempt proceedings against Girardi) cannot cure an improper

indictment. 443 U.S. at 558, 99 S.Ct. at 3001. Finally, the *Ballard* court likewise found that structural defects could only be cured by a dismissal of the indictment. 329 U.S. at 196, 67 S.Ct. at 265. In other words, if a grand jury is improper, any ensuing indictment is also improper, cannot be cured, and must be dismissed.

Further, although the Supreme Court has apparently not addressed the issue, there is no "cure" for indictments issued by a grand jury after its term has expired because the validity of the grand jury itself is in question. *Bolton; Armored Transport; Macklin; Fein, supra.* The *Macklin* court even upheld the trial court's dismissal of an improperly rendered indictment, although the defendant in that case had pled guilty. "We cannot erode the protective formality of the role [of the grand jury] because of a hard case. The charge to which the appellee pleaded guilty was contained in the very indictment we have held to be a nullity." 523 F.2d at 196.

Similarly, we should not here pierce the veil of secrecy surrounding the grand jury's deliberations to determine the numerical basis for the defendants' indictment. The government argues that, unless the defendants show that fewer than 12 qualified grand jurors voted to indict them, Rule 6(b)(2) prohibits a dismissal. This argument is without merit. First, there is no question of grand juror "qualification," as is meant by the Rule and 28 U.S.C. § 1867. Second, and more importantly, the Rule does not apply because, as in *Vasquez*, the entire grand jury has been tainted. No court can erase the taint.

The only remedy, then, for an improperly constituted grand jury is the one issued here today: a dismissal of the

indictment. The Supreme Court in *Vasquez* did not instruct a reviewing court to determine whether a grand jury would have indicted the defendant if he were white, because that question does not address the problem inherent in having a defective grand jury. Likewise, the court in *Macklin* did not accept the defendant's plea because it would have validated a violation of a right guaranteed by the constitution and ridiculed a part of our criminal justice system that stands as the only protection we have against wrongfully brought criminal charges.

We cannot here, then, separate the harm resulting from Girardi's actions from the defendants' indictments, because the harm was inflicted on the judicial process and thereby to the defendants. Indeed, the "harm" caused by Girardi's illegal conduct runs not simply to the defendant, but "to the jury system, to the law as an institution, to the community at large and to the democratic ideal reflected in the process of our courts." *Ballard*, 329 U.S. at 195, 67 S.Ct. at 265.

The Injury to the System Out Weighs Any Inconvenience to the Government.

Although we do not believe that we are obligated to weigh the costs to the government of dismissing this indictment against the harm to the defendants, we note that, in dismissing this indictment, we are not significantly inconveniencing the government. It has at least six months in which to re-indict the defendants without running into any statute of limitations problems. 18 U.S.C. § 3288. Since there has been no trial, the costs to the judicial system are minimal. *Rose*, 443 U.S. at 558, 99 S.Ct.

at 3001, *cf., U.S. v. Mechanik*, 475 U.S. 66, 72, 106 S.Ct. 938, 942, 89 L.Ed.2d 50 (1986) (discussing generally costs of reversing conviction after trial).

Also, the U.S. Attorney has shown considerable alacrity in obtaining indictments. Girardi was, for example, arrested on January 5, 1994, indicted on January 20, 1994 and convicted on May 18, 1994. The Court wonders why the U.S. Attorney refused to voluntarily dismiss the indictments in this case and reindict, rather than allow the reputation of the local Grand Jury to suffer this blemish.

Further, after reviewing the FBI reports, we are unconvinced that the defendants were not prejudiced by the Special Grand Jury's improper actions. Although we cannot expound in great detail about the FBI reports submitted in support of the government's Response, we believe a brief summary of some of the events shows that the defendants may have suffered prejudice.[3]

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[3] We question the propriety of submitting these reports *ex parte in camera*, without leave of court. We also question the government's use of these "secret" reports in support of their pleadings in this case; these reports do not concern the grand jury, *per se*, but were part of the FBI's investigation of Girardi's criminal activity. They were not essential to the government's position in its Response. It strikes us fundamentally unfair that the government asks us to make a decision of Constitutional import to the defendants, based on documents to which the defendants never had access. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

As an initial matter, the jurors who were allegedly willing to sell their votes (including Girardi) could have voted to indict certain defendants in retaliation for not receiving the bribes they purportedly solicited. This possibility coupled with the offer made to Lantini raise a genuine issue of the existence of other jurors who did not exercise impartiality when performing their official duties.

In addition, one grand juror "treated" at least half of the grand jury to drinks and dinner. This generous juror became so intoxicated on one occasion, that his memory of the evening is a blank. It is very likely that the jurors discussed the grand jury proceedings while at these public parties. Also, one party under investigation stated that he received information about the grand jury from a source *other than* Girardi. Thus, Girardi may not have been the only juror involved in serious impropriety or guilty of breaching Rule 6(e).

Further, one of the jurors admitted to the FBI that on at least one occasion he used facial expressions and other non-verbal communication to move Girardi into voting for an indictment. This hints at a possible "pack mentality" pervasive throughout this grand jury that could have severely prejudiced these defendants.

In addition to possibly prejudicing the defendants, sustaining these tainted indictments would wreak considerable harm on the judicial process itself. Girardi's arrest, trial and conviction were widely publicized and certainly caused people to question the integrity of the grand jury system. Girardi's actions "destroyed the appearance of justice and thereby cast doubt on the integrity of the

judicial process." *Rose*, 443 U.S. at 555, 99 S.Ct. at 3000. These doubts can not be mollified solely by Girardi's trial and conviction. Indeed, as Justice Frankfurter stated almost 40 years ago:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

Communist Party of the U.S. v. Subversive Activities Control Bd., 351 U.S. 115, 124, 76 S.Ct. 663, 668, 100 L.Ed. 1003 (1956).

We are aware that other judges have held that Girardi's illegal actions do not warrant a dismissal of an indictment. *U.S. v. Li*, 1994 WL 118539 (N.D.Ill., April 6, 1994); *U.S. v. Coffey*, 1994 WL 118513 (N.D.Ill., April 5, 1994). Our review of those opinions shows that Girardi's actions were apparently presented to our sister courts in terms of a Rule 6(e) violation. If Girardi had spoken to his wife or neighbors about the grand jury proceedings or otherwise simply "broken the rules," we would have joined in our fellow judges' decisions. As explained above, however, the defendants herein presented a compelling due process argument. This case had Constitutional import that goes beyond a mere breach of secrecy or violation of a rule of procedure.

Conclusion.

The situation presented here troubles us deeply and compels us not to be complacent about attempting to preserve the integrity of our democratic institutions in the eyes of the public. Too often actors in the criminal justice system trample over the rights of the accused in pursuit of a conviction at any cost. Too often we overlook or minimize these violations of Constitutionally guaranteed rights because it is easier than upsetting the course of a criminal prosecution. We will not, for the sake of convenience, sustain these indictments simply on the ground that these defendants will probably be re-indicted; we will not so easily dispense with our responsibilities as guardians of the Constitution and administrators of the criminal law. "Justice must maintain the appearance of justice." *Liteky v. U.S.*, ___ U.S. ___, ___, 114 S.Ct. 1147, 1162, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring). In this case, the reality as well as the appearance of justice demand a dismissal of the indictments.